No. 17-35640

In the United States Court of Appeals
for the Ninth Circuit

Chamber of Commerce of the United States of America, et al.,
Plaintiffs-Appellants,

v.

City of Seattle, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

DEFENDANTS-APPELLEES' PETITION FOR REHEARING OR REHEARING EN BANC

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REASONS FOR REHEARING

As the Supreme Court and this Court have long recognized, "the free market principles espoused in the Sherman Antitrust Act" must sometimes cede to "countervailing principles of federalism and respect for state sovereignty." *Traweek v. City & County of San Francisco*, 920 F.2d 589, 591 (9th Cir. 1990). The panel opinion here decimates those principles by construing the requirements for state-action antitrust immunity ("*Parker* immunity") in a manner that precludes States from exercising their sovereign powers through local governments best situated to respond to changing local needs and circumstances, and threatens a wide range of existing government programs and regulations. The opinion conflicts with decisions of the Supreme Court, this Court, and at least three other Circuits. *See Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64 (1985); *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir. 1984); *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983); *Elec. Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110, 127 (2d Cir. 2003). Rehearing is necessary to secure and maintain uniformity of this Court's decisions, and address an issue of exceptional importance. Fed. R. App. P. 35(a); 9th Cir. R. 35-1.

In reversing the dismissal of a federal antitrust challenge to a Seattle

Ordinance authorizing the collective organization of independent contractor drivers in Seattle's for-hire transportation and taxicab industries, the panel held that the Ordinance satisfies neither of the two requirements for *Parker* immunity. It concluded that the "active supervision" requirement was not met because Seattle, not Washington state, officials are responsible for supervising the conduct of private parties subject to the Ordinance. Op. at 34-37. Its conclusion that *state* officials must supervise participants in *local* regulatory programs conflicts with *Tom Hudson*, 746 F.2d 1370 (9th Cir. 1984), and the decisions of every other Circuit Court to consider the issue—authorities the panel ignored, *see Tri-State Rubbish*, 998 F.2d at 1079 (1st Cir.); *Gold Cross Ambulance*, 705 F.2d at 1014-15 (8th Cir.); *Elec. Inspectors*, 320 F.3d at 127 (2d Cir.).

This unprecedented holding will impose substantial new burdens on state governments and hamstring local governments without promoting any of the "active supervision" requirement's purposes. Indeed, because states frequently delegate regulatory authority to local governments in areas like transportation, garbage collection, and emergency services, and local governments often rely on private parties to implement regulatory programs in those areas, the panel's decision will invalidate longstanding local government practices throughout the Circuit and expose many public and private actors to antitrust claims.

The panel separately held that the Ordinance is not entitled to *Parker*

immunity because it was not enacted pursuant to a clearly articulated and affirmatively expressed Washington policy to displace competition with regulation. Op. at 20-31. The panel concluded that this "clear articulation" requirement was not met because the relevant Washington statutes fail to address the specific form of regulation embodied in the Ordinance, Op. at 24, even though the Washington Legislature explicitly granted Seattle authority to regulate for-hire transportation and taxicab services "without liability under federal antitrust laws," including by adopting "[a]ny other requirements" to ensure "safe and reliable … transportation service," Wash. Rev. Code §§46.72.001, 46.72.160(6), 81.72.200, 81.72.210(6); the City Council made extensive findings that the Ordinance will improve the safety and reliability of transportation services in Seattle, Ordinance 2d Whereas Cl., §1; and the District Court dismissed on the merits plaintiffs' claim that the City Council acted beyond its state law authority (a conclusion plaintiffs did not appeal).

The panel's holding fails to heed the Supreme Court's repeated reminders that state legislatures need not "explicitly authorize specific anticompetitive effects before state-action immunity [can] apply," *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 229 (2013), and that *Parker* immunity permits state legislatures to delegate regulatory authority to the entities best suited to respond to "problems unforeseeable to, or outside the competence of, the legislature," *Southern Motor Carriers*, 471 U.S. at 64. By requiring state legislatures to specify every way a

delegation of regulatory authority may be exercised and ignoring the City Council's findings, the panel's holding prohibits states from giving local governments the flexibility and discretion to exercise delegated powers in the manner most responsive to changing local circumstances, and deprives states of their sovereign power to structure their internal government, including by dividing power between different levels of government.

BACKGROUND

This lawsuit challenges Seattle Ordinance 124968 "Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers." The Seattle City Council enacted the Ordinance "to ensure safe and reliable for-hire and taxicab transportation service" within Seattle by establishing a process through which taxicab, transportation network company, and for-hire vehicle drivers can collectively negotiate their agreements "with the entities that hire, direct, arrange, or manage their work." Ordinance 2d Whereas Cl., §1.C.[1] The Council made extensive findings, based partly on experience in other transportation industries, that establishing a framework for such negotiations would "enable more stable working

[1] Transportation network companies ("TNCs") are companies like Uber and Lyft that that "offer[] prearranged transportation services for compensation using an online-enabled TNC application or platform to connect passengers with drivers using their personal vehicles." Seattle Mun. Code ("SMC") 6.310.110.

conditions and better ensure that drivers can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner." *Id.* §1.I.

The Ordinance establishes a process whereby a majority of a company's qualifying drivers may choose to designate an "exclusive driver representative" to negotiate with the company regarding certain subjects, including "best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours of work, conditions of work, and applicable rules." SMC 6.310.735.F, H.1. Before any jointly submitted proposal can take effect, it must be affirmatively approved by a city official based upon a determination that the proposal "promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance[s] the public policy goals set forth in [the Ordinance]." SMC 6.310.735.H.2.

The Chamber of Commerce sued, asserting, *inter alia*, that the Sherman Act preempts the Ordinance. ER 125-154. The District Court (Lasnik, J.) dismissed the Chamber's claims. ER 1-28. The Court held the Ordinance exempt from federal antitrust challenge under the "state-action" immunity doctrine recognized in *Parker v. Brown*, 317 U.S. 341 (1943), because Washington law "clearly delegate[s] authority for regulating the for-hire transportation industry to local government units

and authorize[s] them to use anticompetitive means in furtherance of the goals of safety, reliability, and stability[,]" and a city official's extensive involvement in certifying driver representatives and approving jointly submitted proposals constitutes "active supervision" sufficient to ensure that any agreement promotes the City's policy goals. ER 8-16.

The panel reversed the antitrust claims' dismissal, concluding that neither requirement for *Parker* immunity was satisfied.

ARGUMENT

I. The Panel's Interpretation of the "Active Supervision" Requirement Conflicts with the Decisions of this Court and Multiple Other Circuits and Will Hamstring Local and State Governments.

The panel held *Parker* immunity's "active supervision" requirement was not satisfied because "the State of Washington plays no role in supervising or enforcing the terms of the … Ordinance." Op. at 34. But the Supreme Court has never held that state officials must supervise local government programs for *Parker* immunity to apply; this Court has previously found municipal supervision sufficient; and all the Circuits to consider the question (including the First, Eighth, and Second Circuits) have held that active supervision of local programs by local officials suffices. Because local governments frequently implement their state-delegated regulatory authority through private parties with the understanding that local (not state) officials may properly supervise the private parties' conduct, the panel's

unjustified holding will invalidate many existing local programs and impose substantial new burdens on state governments.

The active supervision requirement ensures that "the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992). This purpose is served if government officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *N.C. State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101, 1112 (2015) (quotation omitted). The Ordinance easily meets that standard: Before any agreement may take effect, a city official must review every proposed agreement (which is the product of arm's-length negotiations between two parties), affirmatively find the agreement furthers the City's purposes, and issue a written explanation. SMC 6.310.735.H.2, I.3, I.4.

The panel held municipal supervision inherently inadequate because the Supreme Court has described active supervision as requiring supervision "by the State." Op. at 35. But the Supreme Court has never suggested that its references to "the State" should be interpreted to exclude local governments. To the contrary, just as the "state-action" immunity recognized in *Parker* can apply to local as well as state governments, the Supreme Court's references to supervision "by the State" function as shorthand for the State and its subordinate bodies, including local

governments. *See, e.g.*, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985) ("municipal" entities may be "entitled to the protection of the *state* action exemption from the antitrust laws") (emphasis added). The panel suggested its holding was mandated by a 33-year-old footnote stating that "'[w]here state or municipal regulation by a private party is involved, … active state supervision must be shown.'" Op. at 35 (quoting *Town of Hallie*, 471 U.S. at 46 n.10). But *Town of Hallie* considered whether municipal actors must *themselves* be actively supervised by state officials (and said no)—not whether private parties acting pursuant to municipal regulation must be supervised by state rather than municipal officials. 471 U.S. at 46. As with numerous other cases referencing "state" action or "state" supervision, *Town of Hallie* nowhere suggests it used "state" as a term of art excluding local governments to which states have delegated their authority. *See* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 495 n.57 (1987) (*Hallie*'s use of "state" "is best read in its generic sense as contemplating either state or municipal supervision").

This Circuit long ago found municipal supervision sufficient to satisfy the active supervision requirement. *Tom Hudson*, 746 F.2d 1370 (9th Cir. 1984). Every other Circuit to have considered the issue has reached the same conclusion. *Tri-State Rubbish*, 998 F.2d at 1079 (1st Cir.); *Gold Cross Ambulance*, 705 F.2d at 1014-15

(8th Cir.); *Elec. Inspectors*, 320 F.3d at 127 (2d Cir.).[2] As these Circuits have emphasized, because municipal officials (like state government officials) are politically accountable, municipal supervision of private party conduct satisfies the active supervision requirement's purposes of ensuring that such conduct serves the government's regulatory goals and safeguarding against private party abuses. *Gold Cross Ambulance*, 705 F.2d at 1014.

These Circuits have recognized it makes no sense to require *state* government officials to oversee *local* programs enacted pursuant to a delegation of state authority to *local* governments. *Id.* at 1014-15. "[I]t would be implausible to rule that a city may regulate, say, taxi rates but only if a state agency also supervises the private taxi operators." *Tri-State Rubbish*, 998 F.2d at 1079 & n.6 (quotation omitted). This Circuit made that point in *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984), explaining that active supervision doctrine should not be applied in a manner "requir[ing] municipal ordinances to be enforced by the State rather than the City itself," because that would "erode local autonomy" while

[2] The Sixth Circuit once suggested (without analysis) that municipal supervision may not suffice, *see Riverview Inv., Inc. v. Ottawa Community Imp. Corp.*, 774 F.2d 162, 163 (6th Cir. 1985) (order), but subsequently clarified that where (as here) a municipal official has ultimate decision-making authority, the municipal government is the "effective decision maker" and the active supervision requirement is therefore inapplicable, effectively adopting the same rule as the First, Second, and Eighth Circuits. *See Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 536-38 (6th Cir. 2002).

requiring states to "invest [their] limited resources in supervisory functions that are best left to municipalities," *id.* at 1434 (quotation omitted). The leading, most-frequently cited antitrust treatise endorses the same common-sense conclusion. P. Areeda & H. Hovenkamp, 1A Antitrust Law ¶226d at 210-11 (4th ed. 2013); *see City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991) (endorsing Areeda & Hovenkamp's understanding of *Parker* immunity); *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011) (en banc) (citing Areeda & Hovenkamp nine times).

The panel suggested its conclusion was justified because local governments are not "sovereign entities." Op. at 36. But the Supreme Court has never questioned supervision by state administrative agencies, which also are not "sovereign" for *Parker* immunity purposes. *See Dental Examiners*, 135 S.Ct. at 1111. The panel failed to recognize that, like state agencies, local governments are entitled to *Parker* immunity precisely *because* the State has chosen to delegate its sovereign power to them. *Omni*, 499 U.S. at 379 (city ordinance entitled to *Parker* immunity because it constituted "action[] of [the] state sovereign[] …. *ipso facto* exempt from the operation of the antitrust laws") (quotation and alteration omitted). *Parker* immunity's "clear articulation" requirement ensures that governmental actions are taken pursuant to the legislature's delegation of its sovereign power. The "active supervision" requirement, by contrast, ensures that any exercise of that power serves

the government's ends, not merely those of the private parties, *see, e.g.*, *Ticor Title*, 504 U.S. at 635 (active supervision ensures regulations not adopted "simply by agreement among private parties")—a concern applicable whether delegated authority is exercised by state administrative agencies or local governments.[3]

The panel's unprecedented holding will have profoundly negative effects throughout the Ninth Circuit. In industries from garbage collection and ambulance services to taxicabs and paratransit, state governments frequently delegate to local governments authority to regulate and restrict competition. These delegations make sense because localities are better equipped to deal with such inherently local issues. Local governments exercising that authority often rely upon private parties to implement their regulatory choices—for example, by designating a particular company to serve as garbage collector. Under the panel's reasoning, supervision of those parties by local government is not sufficient to avoid antitrust liability; if no *state* official supervises that conduct, both the local government and the private parties may be subject to a Sherman Act lawsuit. To avoid such risk, local governments will be forced to provide such services themselves, depriving the government and public of the cost and efficiency benefits of using the private sector.

[3] The "narrow exception *Hallie* identified" was not that local governments may invoke *Parker* despite their non-sovereign status, as the panel believed, Op. at 36, but that active supervision is not required where private parties are not involved in local regulatory efforts, *Dental Examiners*, 135 S.Ct. at 1112-13.

Further, local governments will be required to exclude private parties from any role in developing regulatory policies that could be characterized as restricting competition. With respect to the industry here, for example, cities throughout the Ninth Circuit have established standardized taxi fares. Under the panel's reasoning, cities that permit private parties (such as drivers, consumers, or regulated entities) to participate in the process of establishing that fare structure face potential antitrust lawsuits. Cities could avoid that risk only by adopting regulations unilaterally, leading to policies less responsive to the needs and concerns of regulated parties and the public.

The panel's holding also imposes heavy burdens on state governments. State legislatures that delegate regulatory authority to local governments so its exercise can be tailored to local needs and conditions will be required to create and fund state-level entities to supervise every local program enacted pursuant to that authority. Because this state entity will be ill-equipped to determine whether private party conduct serves the *local* governments' regulatory goals, such "supervision" will either be uninformed and pro forma or (should the state and local governments expend the time and effort required to coordinate their review) no different in substance from local government supervision.

There is no reason to impose such burdens and limits on state and local governments. Rehearing should be granted to establish that where states have chosen

to delegate regulatory authority to local governments, the obligation to supervise private parties acting pursuant to that delegation, and to ensure that the conduct of those parties serves the local governments' purposes, may reside with local officials.

II. The Panel's Interpretation of the "Clear Articulation" Requirement Intrudes Upon State Sovereignty and Is Contrary to Supreme Court Decisions.

Rehearing is also warranted because the panel's demand that the Washington Legislature specify the *precise* form of regulation cities might choose to enact when exercising delegated authority to regulate local for-hire transportation services is contrary to Supreme Court and Ninth Circuit precedent. This holding construes federal antitrust law in a manner that intrudes substantially upon states' ability to exercise sovereign power through subdivisions such as municipal governments or state government agencies, contravening the decisions of the Supreme Court and this Court.

For *Parker* immunity to apply, challenged conduct must be undertaken "'pursuant to state policy to displace competition with regulation.'" *Mercy-Peninsula Ambulance, Inc. v. San Mateo County*, 791 F.2d 755, 757 (9th Cir. 1986) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978)). That policy must be "clearly articulated and affirmatively expressed." *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105 (1980). Here, the Washington Legislature's intent to delegate to Seattle the authority to restrict competition in the

for-hire and taxicab transportation services markets could not be clearer: The Legislature explicitly stated that cities may regulate those markets "without liability under federal antitrust laws," Wash. Rev. Code §§46.72.001, 81.72.200; that delegation includes the authority to adopt "any" requirement designed "to ensure safe and reliable for hire vehicle transportation service," Wash. Rev. Code §46.72.160(6); and the City Council enacted the Ordinance pursuant to this delegation, making extensive findings that the Ordinance will promote the safety and reliability of local transportation services, Ordinance 2d Whereas Cl., §1.

The Supreme Court and this Court have consistently rejected the panel's conclusion that state legislatures must enumerate each specific form of regulation municipal governments might permissibly enact pursuant to delegated regulatory authority.[4] The Supreme Court has expressly stated that a city need not "be able to point to a specific, detailed legislative authorization" for its regulation. *Lafayette*,

[4] In cases the panel believed controlling, the legislature had authorized certain conduct but was *silent regarding intent to authorize displacement of competition*, or had authorized anticompetitive conduct in one area but not necessarily in others. *See, e.g. Phoebe Putney*, 568 U.S. at 227-28 (general corporate power to acquire property did not authorize hospital to "act or regulate anticompetitively"); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 584-85 (1976) (pervasive regulation of electricity market did not authorize anticompetitive conduct in "unregulated" light bulb market); *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187, 1189 (9th Cir. 1988) (defendant granted exclusive right to *dispatch* air ambulances, but not exclusive right to *operate* ambulances). In this case, however, the Washington Legislature explicitly stated its intent to authorize Seattle to restrict competition in all aspects of the for-hire transportation services market.

435 U.S. at 415. "Narrowly drawn, explicit delegation is not required." *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1413 (9th Cir. 1985); *see also Phoebe Putney*, 568 U.S. at 229 (state legislatures need not "explicitly authorize specific anticompetitive effects before state-action immunity [can] apply"). The "clear articulation" requirement simply requires a showing that "the State as sovereign clearly intends to displace competition in [the] particular field [at issue] with a regulatory structure." *Southern Motor Carriers*, 471 U.S. at 64. The City's regulatory authority may be "defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated." *Dental Examiners*, 135 S.Ct. at 1112.

The panel concluded that the Ordinance does not satisfy the clear articulation requirement because the relevant Washington statutes address "the provision of privately operated for hire transportation services" rather than arrangements "between for-hire drivers and driver coordinators." Op. at 24 (quotation omitted). This parsing of Washington law was wrong on multiple fronts.

Nothing in the statutory text suggests the Washington Legislature sought to exclude such arrangements, which have a significant and direct effect on for-hire transportation services, from its authorization of "any" municipal regulation that

furthers the safety and reliability of those services.[5] To the contrary, the District Court held the Ordinance was a valid exercise of the City's authority under the cited Washington laws, and the Chamber did not appeal that holding. ER 24-26.

This Court has emphasized that, when applying the clear articulation standard, federal courts' role is not to resolve such questions of state law authority. *See*, *e.g.*, *Boone v. Redevelopment Agency*, 841 F.2d 886, 891 (9th Cir. 1988) (clear articulation requirement satisfied even if city acted *without* state law authority); *Traweek*, 920 F.2d at 592-93 (city does not lose antitrust exemption by exercising zoning authority maliciously). Instead, courts must apply a "concept of authority broader than what is applied to determine … legality … under state law." *Omni*, 499 U.S. at 372 (citing analogous standard for judicial immunity). Accordingly, even if the City Council and District Court *were* wrong in concluding that the Ordinance falls squarely within the City's delegated authority to regulate *all* aspects of the local for-hire transportation services industry (which they clearly were not, because the Chamber did not appeal the District Court's decision on that issue), that would not result in the denial of *Parker* immunity.

[5] The Legislature defined transportation to include "*any service in connection with* the receiving, carriage, and delivery of persons transported and their baggage and all facilities used[.]" Wash. Rev. Code §81.04.010(15) (emphasis added).

The panel also suggested that because Uber and Lyft "did not exist when the Washington statutes were enacted," those statutes could not have granted Seattle authority to respond to the "novel challenges and contexts for regulation" presented by those companies' technologies. Op. at 31. But the very purpose of *Parker* immunity is to permit state legislatures to delegate power to entities such as local governments or state agencies that are best situated to respond to "problems *unforeseeable to*, or outside the competence of, the legislature." *Southern Motor Carriers*, 471 U.S. at 64 (emphasis added). In any event, this form of providing transportation services is not so novel—individuals have used phones to hail rides for over a century—and courts long ago rejected similar efforts to evade regulation. *See, e.g.*, *Rhone v. Try Me Cab Co.*, 65 F.2d 834, 835 (D.C. Cir. 1933) (rejecting taxi dispatch company's argument that it could not be liable for passenger injuries because it merely "furnish[ed] its members a telephone service").[6]

[6] As the District Court explained, companies like Uber and Lyft "organiz[e] and facilitate[e] the provision of private cars for-hire in the Seattle market," it is "disingenuous to argue that they are beyond the reach of a statute that deems 'privately operated for hire transportation services' vital to the state's transportation system and authorizes regulation thereof," and the companies' "technology and contractual relationships, which control a number of the very activities RCW 46.72.160 and RCW 81.72.210 expressly authorize municipalities to regulate, put [them] squarely within the scope of local regulation under those statutes." ER 12; *see also O'Connor v. Uber Technologies, Inc.*, 82 F.Supp.3d 1133, 1141 (N.D. Cal. 2015) ("*Uber does not simply sell software; it sells rides*. Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs …. If … the focus is on the substance of what the

The panel's construction of the "clear articulation" requirement decimates the very federalism and separation-of-powers principles underlying *Parker* immunity. Rather than respecting States' sovereign power to choose when and how to delegate authority to sub-entities such as municipal governments, it requires state legislatures to dictate every way a delegated power might possibly be exercised. This rule forces states to supplant carefully tailored local regulations with uniform statewide mandates, and prevents states from using local governments as laboratories for the very forms of regulatory experimentation our federal system is designed to promote. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). There is no basis in Supreme Court or Ninth Circuit precedents for this intrusion upon state sovereignty.

CONCLUSION

En banc or panel rehearing should be granted.

Respectfully submitted,

Dated: June 25, 2018

/s/ Michael K. Ryan
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firm actually does …, *it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one*.") (emphasis added); *Doe v. Uber Techs., Inc.*, 184 F.Supp.3d 774, 786 (N.D. Cal. 2016) (similar); *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1067, 1078 (N.D. Cal. 2015) (similar).

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